

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

1464

76-1465

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Appellee,

-against-

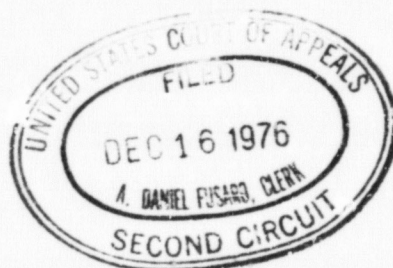
COSME A. CACERES, LEOPOLD LOZANO
and JOSE A. LIRIANO,

Appellants

Appeal From the United States District Court
For the Eastern District of New York

BRIEF FOR APPELLANT LEOPOLD LOZANO

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

THE UNITED STATES OF AMERICA,

Appellee,

-against-

COSME A. CACERES, LEOPOLD LOZANO
and JOSE A. LIRIANO,

Appellants

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT LEOPOLD LOZANO

STATEMENT

The appellant, LEOPOLD LOZANO, appeals from a judgment rendered in the United States District Court for the Eastern District of New York (Bramwell, J.) convicting him of the crimes of conspiracy to possess and utter counterfeit United States Currency, and possession and uttering counterfeit United States Currency, in violation of Title 18, United States Code, Sections 2, 371, 472. (A-158 to A-161)*

Proceedings were begun when the appellant was indicted in the Eastern District of New York. The indictment alleged six (6) counts against appellant.

Counts one, two, three and four charged the appellant and two (2) co-defendants with uttering four

*Numbers in parenthesis refer to pagination of Appendix.

counterfeit twenty dollar Federal Reserve Notes with intent to defraud; count five charged the appellant and two (2) co-defendants with possession of six counterfeit twenty dollar Federal Reserve Notes and one counterfeit fifty dollar Federal Reserve Note; count eight charged the appellant and two (2) co-defendants with a conspiracy on or about October 31, 1975 to possess and utter counterfeit twenty and fifty dollar Federal Reserve Notes.

STATEMENT OF THE ISSUES
PRESENTED FOR REVIEW

A. Should the evidence obtained as a result of appellant's arrest been suppressed?

B. Was the introduction of Government Exhibits 3, 4 and 11 into evidence reversible error?

FACTS

A: Suppression Hearing : Physical Evidence

Police officer Thomas Gaffney, a witness called by the prosecution, testified that on October 31, 1975, at about 7:00 P.M., he and his partner Officer James Hughes were writing out an accident report at Broadway and Steinway Street in Astoria, Queens, when a car, driven by Mr. Richard Simmons, pulled up along side their patrol car. Mr. Simmons informed the Officers that three Spanish men were passing counterfeit bills on Broadway. (10,11)

Gaffney asked Simmons to show him the last place he saw them go into and thereupon followed Simmons to a bakery shop located at 3209 Broadway. (11) Gaffney entered the bakery and asked the girl behind the counter (Josephine Pollizi) "if somebody came in here and cashed a twenty dollar bill." Ms. Pollizi answered in the affirmative and handed the officer a twenty dollar bill(12)

The witness looked at the bill and took it across the street to a bank. He showed it to someone at the bank and was told it was counterfeit. (12) After leaving the bank, Gaffney again spoke with Simmons and took his name, address and telephone number and was told to go home. At this time, Simmons described the car the three defendants were riding in as a green Chrysler, bearing New York plate number 902 XLL. (13)

Thereafter, the Officers drove down Broadway and approximately six (6) blocks from the bank they observed the defendants' car parking. At this time they parked in front of the defendants' car, exited the patrol car and approached the three defendants still seated in the car. (13, 33)

Gaffney asked the driver (defendant Liriano) for his license and registration and to exit the car. All three defendants exited the vehicle and were placed under arrest. (14, 54) **

** The Government conceded at the Hearing that the defendants were under arrest when approached by the officers. (53)

On cross examination defense counsel elicited that Simmons never showed him currency of any kind nor told that any was received by him. Further examination revealed that the witness did not remember Simmons telling him how he, Simmons, knew the currency was counterfeit, but Gaffney did recall that he did not inquire as to Simmons' knowledge. Moreover, other than indicating the men were Spanish, no other description was given to the witness. (26, 47, 55)

Upon further cross examination Gaffney testified that the woman at the bakery, Ms. Pollizi, did not tell him when she received the twenty dollar bill or who had given it to her. Although he did not remember if she gave him a description of who passed the bill, he recalled that he did not ask her for a description. (27, 44)

Furthermore, although Gaffney testified on cross that the person he showed the bill to at the bank said he was the manager, his name was not taken nor was any inquiry made as to the individual's expertise in recognizing counterfeit money. (28, 30, 31, 50)

B: Suppression Hearing: Confession

Special Agent Dorio Marquez, a witness called by the Government testified that on October 31, 1975 following the Appellant's arrest, he translated a statement made by the

Appellant to Agent Smith and thereafter signed it. (transcript, 6/3/76, pages 1-34)

B: Trial

Richard Simmons, a witness called by the government testified that he was a retired cab driver and part owner of the Sit and Smoke candy store located in Astoria, Queens. That on October 31, 1975 at about 6:30 P.M. he saw a person, described as dark, believed to be black, wearing dark slacks and a green plaid jacket enter his store. After the person left the store, his partner showed him a twenty dollar bill which he looked at and testified was bad. He went out to follow the person and saw him in Leo Pete's Grovery. Thereafter he observed the person enter a car containing two other dark males, described as being a Chrysler or Dodge, long and green. He further testified that although he saw the car in front of a bakery on Broadway, he did not see the defendants enter it. Although Simmons identified the defendant Lozano as the person who entered his store, one day after the incident he identified the defendant Caceres as being that person. Simmons testified he did not see the individual give his partner the bill. (Transcript, 6/7/76, pages 24, 26, 27, 28, 30, 31, 38-42, 67, 70-72)

Peter Kordasis, a witness called by the Government, testified that on October 31, 1975 he appeared at work in Leo Pete Grovery at 6:30 P.M. That at about 7:00 P.M., a man,

described as dark, purchased a pack of cigarettes and handed him a twenty dollar bill. Kordasis testified that the bill was given to Officer Gaffney along with another twenty dollar bill that was taken in before he got to work. Both bills were marked Governments's Exhibit 3 for identification.

(Transcript, 6/8/76, pages 4, 5-7, 9-10, 12, 16, 18, 19)

Josephine Polizzi, a witness called by the Government, testified that on October 31, 1975 she worked at Pasticceria La Torre Bakery. At about 6:30 P.M. someone gave her a twenty dollar bill in exchange for a purchase of cookies. Thereafter the bill was given to Officer Gaffney. The bill was marked Governments Exhibit 4 for identification. (Transcript, 6/8/76, pages 22, 23, 25)

Police Officer Thomas Gaffney, a witness called by the Government, testified as to the circumstances leading up to the arrest of the defendants. His testimony was substantially the same as that at the Hearing on the motion to suppress. He testified that after placing the cuffs on defendant Liriano a bystander yelled that kids are running off with a brown paper bag. He ran after the kids and recovered a brown paper bag approximately 250 feet from the defendants' car. He did not see the bag dropped and the first time he saw it, it was lying on the ground. Upon examining the bag it was found to contain five (5) twenty dollar bills. (Government Exhibits 5 and 6 in evidence)

(Transcript, 6/8/76, pages 32, 34, 35, 36)

Upon returning to the defendants' car, Gaffney observed a brown paper bag on the front seat containing \$552.68 in United States Currency, marked Governments' Exhibit 7 in evidence. (Transcript, 6/8/76, pages 37, 38, 40, 42, 44, 45)

A fifty dollar bill was recovered from defendant Lirio and a twenty from defendant Caceres. Exhibits 9 and 10 respectively in evidence. (Transcript, 6/8/76, pages 48-49, 51-53)

Gaffney testified as to the oral confession made by defendant Caceres, who was wearing a plaid jacket on the date of arrest. He further testified that the defendant Lozano was never seen in possession of the brown paper bag containing the five twenty dollar bills. (Transcript, 6/8/76, pages 53-54, 59)

Eva Walken, a witness called by the Government, testified that she is the manager of Walkins Bakery, located in Astoria, Queens and was working there in the evening of October 31, 1976. That on said date, between 6:00 P.M. and 7:00 P.M. a twenty dollar bill was taken in, which was subsequently mailed to Special Agent Smith. The witness did not know who gave her the bill. Ms. Walken further identified a Walken's Bakery Box which they used in 1975. The twenty

dollar bill was marked Exhibit 11 and the box 12 for identification. (Transcript, 6/8/76, pages 75, 82, 83, 84, 86).

Special Agent Charles J. Quinn, Jr., a witness called by the Government testified as to the circumstances leading up to the written statement of defendant Caceres and the statement itself. Transcript, 6/8/76, pages 87, 90, 93)

Special Agent Dario Marquez, a witness called by the Government, testified as to the circumstances leading up to the statements of defendants' Lozano and Liriano and the statements themselves. (transcript 6/8/76, pages 118, 121, 124)

Special Agent Phillip S. Smith, a witness called by the Government, testified that sometime after the arrest, the defendants' car was taken to a garage maintained by the secret service. The car was inventoried on November 4, 1975 and found to contain the following items: two twenty dollar bills and six ten dollar bills of genuine currency found in the ashtray, exhibit 18 in evidence; a counterfeit fifty dollar bill and a counterfeit twenty dollar bill found in the same ashtray, marked exhibit 19 in evidence; a Walkens Bakery Box, exhibit 12 in evidence and various other items of merchandise. (Transcript, 6/9/76, pages 18, 21, 23, 24, 25, 26)

After qualifying as an expert, Smith testified that the currency representing Exhibits 3, 4, 6, 9, 10, 11 and 19 was counterfeit (Transcript, 6/9/76, pages 30, 33, 34, 35, 36, 38)

POINT ONE

The Evidence Seized as A Result of Appellants' Arrest Should be Suppressed

Case law holds that a search conducted without a warrant is "per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions. Collidge v. New Hampshire, 403 U.S. 443, 454-55 (1971)

Said exceptions include a search incidental to arrest as well as evidence found during an inventory of a car taken into custody after arrest. These exceptions are premised however on the initial legality of the arrest. United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969). Thus, if the arrest is illegal, the search is unlawful and any items of physical evidence seized or oral evidence of what was seen or found is inadmissible and must be suppressed, including a confession. Wong Sun v. United States 371 US 471, (1963); Henry v. United States, 361 U.S. 98 (1959); Giordenello v. United States, 357 U.S. 480 (1958).

An arrest not based upon probable cause is unlawful and cannot be validated by what is disclosed upon a subsequent search. Sibron v. New York, 392 U.S. 40, 62-63 (1968); Wong Sun v. United States, supra, page 484.

It is the appellant's contention that the arrest was not based on probable cause, thus requiring the suppression of all evidence gained therefrom.

As stated in Brinegar v. United States, 338 U.S. 160, 175-76 (1949), probable cause exists where

"...the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that..."

a crime has been or is being committed. See also Carroll v. United States, 267 U.S. 132; Dumbra v. United States, 268 U.S. 435.

As the record indicates, the factual basis which served as the probable cause for the appellant's arrest was the information supplied by Simmons together with the counterfeit twenty dollar note recovered from the Pasticceria La Torre Bakery. It is the appellant's contention that these facts neither singularly nor in conjunction establish the necessary probable cause.

Despite the fact that Simmons' reliability (veracity) as an informant need not be proven, there must still be a factual basis establishing the reliability of the conclusions drawn by Simmons regarding the appellants' criminal activity. United States v. Rollins, 522 F2d 160 (2d Cir. 1975)

According to the testimony of Officer Gaffney, other

than Simmons' bare assertion that three Spanish men were passing counterfeit notes on Broadway, there was no factual basis given to him establishing the reliability of Simmons' conclusion. Gaffney, who never met Simmons before that night, knew nothing about him. He was not shown a counterfeit note by Simmons, nor was he told that Simmons received one. Moreover, the testimony at the suppression hearing does not indicate whether Gaffney knew at the time whether Simmons was a victim or bystander, nor whether Simmons observed the appellants actually passing the counterfeit notes or was informed of such.

Although the counterfeit note recovered from the Pasticceria La Torre Bakery lent some credence to Simmons' assertion, this was insufficient to establish the probable cause that was otherwise lacking. Other than establishing that a counterfeit note was recovered from a store in which one or more of the appellants entered, there were no facts connecting that note to any of the appellants. Neither Simmons nor the employee at the store were able to identify any of the three appellants as the individual who passed the note. Indeed, the employee did not even provide Gaffney with a description. Moreover, when Gaffney recovered the note, he was not informed and did not ask when the note was received. Thus although Simmons' information was corroborated

to the extent that counterfeit notes were being passed, there were still no facts establishing the reliability of Simmons' conclusion that the appellants were the individuals passing said notes.

It is respectfully submitted, the facts and circumstances known to Officer Gaffney at the time of arrest amounted to mere suspicion, falling woefully short of the requisite probable cause to validate the arrest. As such, all evidence obtained therefrom, whether tangible or intangible, written or oral, must be suppressed. If suppressed the introduction of said evidence at trial was so prejudicial to appellant that a new trial should be ordered.

POINT TWO

The Introduction of Government Exhibits Nos. 3, 4 and 11 constitute Reversible Error.

In the interest of brevity, the Appellant reasserts the argument set forth in Point One and incorporates it into the argument in Point Two.

Should this Honorable Tribunal suppress the evidence obtained as a result of Appellant's unlawful arrest, it is the appellant's contention that there was no basis for the introduction of Government Exhibits No. 3, 4 and 11 into evidence.

Exhibit 3, consisting of two counterfeit twenty dollar notes recovered from the Leo Pete Grocery was initially kept out of evidence, there being no connection between the notes and the appellants, (Transcript, 6/8/76, pages 5-7, 16, 18, 19) and thereafter admitted (Transcript 6/9/76, page 30).

Exhibit 4, consisting of one counterfeit twenty dollar note recovered from the Pasticceria La Torre Bakery was marked in evidence at the close of the Government's case. (Transcript, 6/9/76, page 30)

Exhibit 11, consisting of one counterfeit twenty dollar note mailed to Agent Smith, from Walkens Bakery, marked

in evidence at the close of the Governments case. (Transcript 6/9/76, page 30)

As noted during the course of trial, circumstantial evidence consisting of; Exhibit 6, five counterfeit twenty dollar notes recovered at the time of arrest; Exhibit 9; a counterfeit fifty dollar bill taken from appellant Liriano; Exhibit 10, a counterfeit twenty dollar bill taken from appellant Caceres; Exhibit 12, a Walken's Bakery box recovered from appellant's car; Exhibit 19, a counterfeit fifty and twenty dollar note recovered from Appellant's car and the oral and written confessions of the appellants, was used as the basis for connecting the appellants to Exhibits 3, 4, and 11 thus permitting them into evidence. (Transcript 6/8/76, pages 76-81)

It is submitted, should this court suppress the evidence obtained as a result of appellants' arrest, the introduction of Exhibits 3, 4 and 11 in evidence constitutes reversible error.

POINT THREE

The Appellant Lozano Adopts
and Incorporates The Points
Raised by Co-Appellants
Favorable to Him

CONCLUSION

For the reasons stated hereinbefore, the
evidence obtained as a result of Appellant's arrest should
be suppressed, his conviction reversed and the indictment
dismissed, or in the alternative order a new trial.

Dated: Brooklyn, New York
December 16, 1976

Respectfully submitted,

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